In the

Supreme Court of the United States

October Term, 1989

No. 89-534

FOXMEYER CORPORATION, FOXMEYER - TBL, INC.
and FOXMEYER INFORMATION SYSTEMS, INC.
Petitioners

vs.

STONE'S PHARMACY, INC.
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STANLEY D. RAULS
PERRONI, RAULS & LOONEY, P.A.
10810 Executive Center Drive, #215
Little Rock, Arkansas 72211
Telephone: (501) 227-8999

Counsel for the Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

In the

Supreme Court of the United States

October Term, 1989

No. 89-534

FOXMEYER CORPORATION, FOXMEYER - TBL, INC. and FOXMEYER INFORMATION SYSTEMS, INC.
Petitioners

vs.

STONE'S PHARMACY, INC.
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT

In December, 1984, the plaintiff (the respondent) purchased a pharmacy computer system from Pharmacy Accounting Management, Inc. (PAM) for $29,900.00. The sale entailed the delivery of both hardware and software for a specialized computer to be used by the plaintiff in operating a retail pharmacy and keeping books and records. The sale further included a maintenance agreement which required PAM to update information on a continuing basis and maintain the computer hardware.

Around January 17, 1985, FoxMeyer (the petitioner) purchased the assets of PAM (which included inventory and equipment) and moved into PAM facilities, taking control over all PAM assets. No notice of the transfer of assets was given to

the plaintiff, a creditor of PAM, as required by article six of the Uniform Commercial code (Bulk Transfer Act).

During purchase negotiations with PAM, FoxMeyer's attorney prepared several preliminary drafts of the purchase agreement. The language in the preliminary drafts specifically required compliance with the Bulk Transfer Act and specified that the transaction would be closed only after compliance with that statute. Before closing, FoxMeyer advised its attorney that the purchase had been "restructured" for "business reasons." The preliminary drafts of the purchase agreement had contemplated a purchase of substantially all of the assets of PAM, and the final agreement was allegedly altered to provide for a transfer of only a portion of the PAM assets to FoxMeyer. References to compliance with the Bulk Transfer Act were removed from the purchase agreement, and the transaction was closed.

All PAM assets were in possession and control of FoxMeyer after January 17, 1985. FoxMeyer ultimately used all but an insignificant portion of the equipment and inventory formerly owned by PAM. PAM ceased to do business after the transfer and filed a petition for liquidation with the bankruptcy court in March, 1985, after the original complaint was filed in the case below. FoxMeyer subsequently returned a minute portion of the PAM assets to the bankruptcy trustee, alleging that the items returned had not actually been purchased. Almost all of the inventory of PAM was retained and used by FoxMeyer.

The computer purchased by the plaintiff was nonfunctional, and without the promised hardware and software support, it was virtually worthless. The plaintiff filed its complaint alleging that FoxMeyer had failed to comply with the Bulk Transfer Act and had tortiously interfered with the contract between PAM and the plaintiff.

The cause of action initially named PAM, alleging a breach of contract, but that portion of the action was not pursued after PAM filed its petition in bankruptcy court in Dallas, Texas.

This matter was first scheduled for trial in April, 1986. During the week before the scheduled trial, the district judge granted FoxMeyer's summary judgment motion, ruling that the Bulk Transfer Act only applied to transactions specifically proven to be fraudulent; that the transfer was exempt from the Bulk Transfer Act since the sales proceeds were allegedly paid to a secured creditor at the request of FoxMeyer; and that the plaintiff was not a creditor within the meaning of the Bulk Transfer Act since its claim was not liquidated at the time of the transfer. The district judge also granted summary judgment in regard to the tortious interference with contract claim, stating that there were no material facts in dispute. The United States Court of Appeals for the Eighth Circuit reversed the lower court's ruling and remanded the case for trial, *Stone's Pharmacy v. Pharmacy Accounting Management*, 812 F.2d 1063 (8th Cir. 1987).

On remand, the trial court, sua sponte, decided that the case against FoxMeyer should be dismissed because of the PAM bankruptcy proceedings. The trial court held that PAM was an indispensable party under Rule 19, FRCP and further held that the automatic stay in PAM's bankruptcy proceedings prohibited any proceedings against FoxMeyer. Another panel of the Eighth Circuit reversed and remanded the case for trial in district court where it is now pending.

REASONS FOR DENYING THE WRIT

The Bulk Transfer Act claim against FoxMeyer arose from FoxMeyer's failure to give prior notice of a bulk transfer, the acquisition of PAM inventory and equipment. Since only the purchaser (FoxMeyer) was required by the Bulk Transfer Act to give the notice, subsequent bankruptcy proceedings initiated by the seller (PAM) had no bearing on this case. Neither the bankrupt seller nor its assets were affected by this action, and the application of its bankruptcy stay to protect a totally unrelated company was neither proper nor equitable.

The other cause of action filed against FoxMeyer was for the tortious interference with the contact between the plaintiff and PAM. That claim, too, was directly against FoxMeyer and had no connection with the bankrupt seller or its property. The Eighth Circuit properly returned the matter for trial.

ARGUMENT

THE PLAINTIFF'S CLAIMS DID NOT BELONG TO THE BANKRUPT SELLER NOR DID THEY AFFECT ITS PROPERTY

The opinion below noted that the Bulk Transfer Act claim belonged to the plaintiff and did not affect the property of the bankrupt seller. Section 6-105, UCC, outlines the notice required to be given to creditors. That section states:

> In addition to the requirements of the preceding section, and bulk transfer subject to this Article except one made by auction sale (Section 6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, *the transferee* gives notice of the transfer in the manner and to the persons hereafter provided (Section 6-107). [emphasis added]

By the clear wording of the statute, the duty to give notice of the transaction was owed solely by FoxMeyer, and that duty was to give notice directly to the plaintiff, a creditor. The Bulk Transfer Act claim was based upon FoxMeyer's failure to give notice to the plaintiff, and the cause of action for that failure accrued solely to the plaintiff —without regard to the seller in the transaction. If creditors were required to wait for sellers to take action against buyers, the Bulk Transfer Act would have virtually no meaning. In that instance, a seller could, as here, declare bankruptcy and deprive creditors of any meaningful remedy against the buyer, a position urged by FoxMeyer.

The trial court ruled that the seller was an indispensable party to the Bulk Transfer Act claim against the purchaser. The various circuits have been relatively uniform in holding that a grantor is not an indispensable

party to a suit to set aside a fraudulent conveyance. See, e.g., *Allan v. Moline Plow*, 14 F.2d 912, 915 (8th Cir. 1926), *Keaton v. Little*, 34 F.2d 396 (10th Cir. 1929), *Keene v. Hale-Halsell*, 118 F.2d 332 (5th Cir. 1940), *Gardner v. Johnson*, 195 F.2d 717 (9th Cir. 1952), *Fischer v. Rio Tire*, 65 S.W.2d 751 (Commission of Appeals of Texas, 1933), *Reiser v. Bernhard*, 169 N.E.2d 496 (Ct. App. Ohio, 1959) and *Damazo v. Wahby*, 305 A.2d 138 (Ct. App. MD, 1973). Although this was not a fraudulent conveyance action, the rationale that grantors are not indispensable to an action against the buyer would apply with greater force to a Bulk Transfer Act claim, one which requires no fraud but only the failure to give prior notice.

PAM certainly had no interest in the property which it transferred to FoxMeyer—it willingly gave up that interest upon closing. Having transferred all of its interest to FoxMeyer, PAM had no conceivable cause of action against its own purchaser. There was no possibility for PAM to benefit by the litigation below, and PAM should not be considered indispensable to the action.

FoxMeyer complained in its petition that other creditors of PAM could conceivably have been precluded from recovering on their claims. First, FoxMeyer had no standing to make that argument. That argument could only have been presented by the bankruptcy trustee for PAM who was always aware of the action below and made no objection to its continuation against FoxMeyer. Further, the argument assumed other valid claims to the property or its value existed.

There was no connection with other alleged claims and the instant Bulk Transfer Act or tortious interference with contract claims. If FoxMeyer genuinely felt that other creditors of PAM should receive a portion of the property which it had, it could have easily interplead ~~the~~ property or its value in the appropriate court. Instead, FoxMeyer chose to keep the property and pursue motions to dismiss the

plaintiff's action. Not only was the argument inappropriately raised by FoxMeyer, the sincerity of FoxMeyer is highly questionable.

The contention that PAM was an indispensable party certainly had no bearing upon the plaintiff's tortious interference with contract claim. No claim for tortious interference with contract was asserted against PAM, nor could any such claim have been asserted. PAM could not be a party to that claim, much less an indispensable party.

The applicable standard in determining whether a party is indispensable is found in Rule 19, FRCP, which provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.
>
> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall

> determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Neither the Bulk Transfer Act claim nor the tortious interference with contract claim met the criteria in subdivision (a) of rule 19. Assuming, arguendo, that the criteria were met, there was absolutely no "equity" or "good conscience" involved in protecting FoxMeyer from a suit for its actions. There was no good reason for effectively granting FoxMeyer absolute immunity from suit for its disregard of the law and the plaintiff's contract rights.

THE AUTOMATIC STAY OF THE SELLER DID NOT APPLY TO AN UNRELATED PURCHASER WHO FAILED TO COMPLY WITH THE BULK TRANSFER ACT AND TORTIOUSLY INTERFERED WITH THE SELLER'S CONTRACT

Absent some connection between the third party and the bankrupt debtor, the courts have uniformly held that the automatic stay should not be extended to third parties. See *Austin v. UNARCO Industries*, 705 F.2d 1 (1st Cir. 1984), *Teachers Annuity v. Butler*, 803 F.2d 61 (2nd Cir. 1986), *Wiliford v. Armstrong World Industries*, 715 F.2d 124 (4th Cir. 1983), *Wedgworth v. Fibreboard*, 706 F.2d 541 (5th Cir. 1983), *Lynch v. Johns-Manville Sales*, 710 F.2d 1194 (6th Cir. 1983), *Pitts v. UNARCO Industries*, 698 F.2d 313 (7th Cir. 1983), and *Fortier v. Dona Anna Plaza*, 747 F.2d

1324 (10th Cir. 1984). Those cases cited by the trial court or by FoxMeyer in trial brief generally involved litigation initiated by the bankrupt debtor in bankruptcy proceedings.

This case was vastly different from those where the request for protection was made by the bankrupt debtor in bankruptcy court. Here, FoxMeyer, the very party who caused the damage to the plaintiff, was afforded protection in an Arkansas district court under an automatic stay of bankruptcy proceedings instituted in Texas by another corporation.

The purpose of any stay is to protect the bankrupt debtor who, in this particular case, made no objection to the proceedings or took any action to prevent the continuation of litigation against FoxMeyer. There was no justification for a district court in unrelated proceedings to apply a bankruptcy stay for an unrelated entity to FoxMeyer.

If one were to accept every premise upon which FoxMeyer was afforded protection under PAM's bankruptcy stay, there remained one very important question—why was the action dismissed? Had the action been solely against PAM, the entity for whose sake the action was allegedly dismissed, the case would not have been dismissed, it would have been stayed. How can a greater benefit be conferred upon FoxMeyer, a totally unrelated entity, than would have been granted to the bankrupt debtor itself?

The effect of the stay is found in its name. Proceedings are *stayed*, not dismissed. As noted in *Pope v. Manville Forest Products*, 778 F.2d 238, 239 (5th Cir. 1985):

> We recognize that the stay, by its statutory words, operates against "the commencement or continuation" of judicial proceedings. No specific reference is made to "dismissal" of judicial

> proceedings. Nevertheless, it seems to us that ordinarily the stay must be construed to apply to dismissal as well. First, if either of the parties takes any step to obtain dismissal, such as motion to dismiss or motion for summary judgment, there is clearly a continuation of the judicial proceeding. Second, in the more technical sense, just the entry of an order of dismissal, even if entered sua sponte, constitutes a judicial act toward the disposition of the case and hence may be construed as a "continuation" of a judicial proceeding. Third, dismissal of a case places the party dismissed in the position of being stayed "to continue the judicial proceeding," thus effectively blocking his right to appeal. Thus, absent the bankruptcy court's lift of the stay, or perhaps a stipulation of dismissal, a case such as the one before us must, as a general rule, simply languish on the court's docket until final disposition of the bankruptcy proceeding. * * *

The plaintiff has not stipulated to a dismissal of this action. The plaintiff has repeatedly requested a trial, and this case was properly remanded to the district court for a trial.

CONCLUSION

For the foregoing reasons, the petition for the issuance of a writ of certiorari should be denied.

Respectfully submitted,
Stone's Pharmacy, Inc.,
Respondent

BY: STANLEY D. RAULS
PERRONI, RAULS & LOONEY, P.A.
10810 Executive Center Drive, #215
Little Rock, Arkansas 72211
Telephone: (501) 227-8999

Counsel for the Respondent

CERTIFICATE OF SERVICE

I certify that I forwarded copies of the foregoing response by United States mail addressed to Mr. Drew Heard at Shank, Irwin, Conant, Lipshy & Casterline, 2100 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201-3320 on the 11th day of December, 1989.

_____

Stanley D. Rauls